

## Three Basic Principles

**T**here are three basic principles that govern the way lawyers handle almost all battles over evidence. The surprising thing is not the content of these principles; it's how frequently trial lawyers either ignore or forget them. Perhaps this is not unexpected because none of these basic principles is explicitly set forth in either the Federal Rules of Evidence or any other codified rules of evidence. But their essentiality cannot be denied, and their importance justifies—if not demands—a review of them from time to time.

### The first principle

The proponent of a rule must demonstrate entitlement. The first and arguably the most important of the three is the principle that any litigant who relies upon a rule of evidence must be prepared to demonstrate entitlement to that rule. A careful examination of the Federal Rules of Evidence and state codes reveals that this extraordinarily important concept is nowhere codified, but is implicit throughout all rules of evidence and judicial decisions interpreting rules of evidence.

There is also a subprinciple that warrants mention. The subprinciple is that virtually every fight over the admissibility of evidence begins with an objection (or with a motion in limine anticipating an objection). Generally speaking, trial judges leave it to opposing lawyers to decide as a tactical matter whether or not to raise an objection to questions, answers, documents or other evidence. Experienced trial judges may have a knee-jerk reaction to evidence that seems objectionable from the moment it is offered, but they know that there are reasons why the party against whom the evidence is offered may prefer to have it admitted rather than to object. Unless the party against whom evidence is offered is represented by counsel whom the judge fears may be incompetent or the judge is concerned that counsel may be seeking to plant "plain error" in the record by not objecting to evidence, the judge is unlikely to suggest ob-

jections to counsel or to raise objections sua sponte.

In short, registering of an objection is what begins an evidence fight. Without an objection, evidence usually will be admitted without comment by the proponent, the adversary, or the trial judge. Appellate courts will consider any potential objection waived by the failure to object, and will only consider a claim of evidentiary error on appeal under the rather unforgiving plain error standard of review where no objection was made below.

Federal Rule of Evidence 103(a) implicitly recognizes the subprinciple set forth above. It reads in relevant part:

#### Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . . .

On the surface, a reader of the rule might initially find it difficult to locate the subrule in these words, but it is there. Rule 103(a) states that a ruling admitting or excluding evidence will not be of concern unless it affects a substantial right and Rule 103(a)(1) states the requirement of a specific, timely objection or motion to strike when the ruling is one admitting evidence. Because judges generally will not raise objections on their own, there will not be an occasion for a ruling that excludes evidence unless a party has objected. Thus, it is the objection that begins an evidence battle. If the objection is sustained, Rule 103(a)(2) imposes an offer of proof requirement upon the party whose evidence has been excluded (a subject addressed in the next column). If the objection is overruled, the evidence will be admitted. The critical point is that there will be no ruling admitting or excluding evidence unless there is an objection. This is why the subprinciple is implicitly recognized by Rule 103(a).

### Demonstrating entitlement

The party who triggers an evidence fight, the objector, bears a special responsibility: i.e., the objector must make the correct objection. For example, suppose a

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prosecutor in a criminal case calls a police officer who arrested a defendant for a robbery to testify that he went to the defendant's house on the day of the robbery after an eyewitness gave him a description of the robber and told him that the defendant might be the robber. The defense will almost surely object "hearsay." The objection seems valid on its face, because the officer appears to be relating statements made by the eyewitness (a hearsay declarant) for their truth (and probable cause issues will have been resolved before trial day by the judge.) If the defense objects that the testimony does not satisfy the best evidence rule because the eyewitness's testimony is the best evidence, the objection will be overruled, because the best evidence rule has no applicability to these facts. Thus, the objecting party either raises the correct objection or suffers the consequences of a mistaken objection, which is to have the evidence admitted and the correct objection waived.

If the defense raises the correct objection, the burden shifts to the proponent to respond to the objection. If, for example, the prosecution in the example offered above says nothing in response to the hearsay objection, the trial judge is likely to sustain the objection. What might the prosecutor say? One frequently made response to this type of objection is for a prosecutor to say "we are not offering the testimony for its truth, but to explain why the officer went to the defendant's house on the day of the robbery." This is a shorthand statement that meets the hearsay objection head-on. The prosecutor is asserting that the testimony is not offered for its truth but to explain the officer's actions. If the prosecutor makes this argument, the prosecutor is satisfying the obligation imposed on all parties to demonstrate their entitlement to rely upon an evidence rule. In essence, the prosecutor is neutralizing the hearsay objection by representing to the court that the evidence is not offered for its truth and thus is nonhearsay under Federal Rule of Evidence 801(c).

The prosecutor's response, however, is not the end of the story. The defense may respond by saying "the evidence is irrelevant since the question is not why the officer went to the defendant's house, but whether the defendant committed the robbery." Such a response represents a new objection. The defense, raising a new objection, must demonstrate entitlement to it, and defense counsel in this illustration has borne the requisite burden of raising a relevance objection. Assuming that the defense is correct and there is nothing of relevance in the reason why the officer went to the house, the prosecutor must bear the burden of providing another reason why the testimony should be admitted or it will be excluded.

There are variations on this example that may help to illustrate the first basic principle. Suppose, for instance,

the defense objected on hearsay grounds, and the prosecution responded that the eyewitness's statements qualified as excited utterances. In this scenario, the prosecutor would be required to demonstrate that the excited utterance rule—Federal Rule 803(2)—is satisfied. Factual disputes about the circumstances in which the statements were made would be decided by the trial judge, who would consider any evidence available except privileged evidence under Federal Rule of Evidence 104(a). Because it is the prosecutor who claims that the statements are excited utterances, it is the prosecutor who must prove that they are in order to demonstrate entitlement to the evidence.

These are two of a virtually unlimited number of examples that could be used to illustrate the first basic principle. If a party objects to evidence and claims privilege, the party must prove the elements of the privilege. So, if one side calls an attorney to testify and the other side objects on the ground of attorney-client privilege, the objecting party must prove that the privilege applies. Assuming that the proof is sufficient, the proponent of the evidence might respond by relying on an exception to the attorney-client privilege such as the crime or fraud exception. If so, the proponent bears the burden of demonstrating entitlement to the exception. The first principle is clear. A party who relies on an evidence point must demonstrate entitlement. Sometimes this is done simply by objecting; other times it is done by argument or explanation, and in some circumstances proof is required.

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## The second basic principle

Counsel must know what the burden is. The second basic principle is closely related to the first: Counsel must know what is required to demonstrate entitlement to an evidence rule. In fact, this rule has two parts that are interrelated. Counsel must know what they must do to make their evidence arguments and they must know what their opponents must do in order to respond and when a response is inadequate. If counsel mix up their obligations with those of their opponents, they will lose evidence fights that they otherwise might win.

A good example of the second basic rule is *United States v. Meserve*, 271 F.3d 314 (1st Cir. 2001). Meserve was convicted of robbery and firearms offenses arising out of the robbery of a market. The case was not complicated. Meserve showed his girlfriend/accom-

police a shotgun on the evening of the robbery and told her he was going to rob the market. He took her with him when he drove to the market. Meserve got out of the car, leaving the girlfriend inside the car while he put on a ski mask and entered the market with a gun. He forced an employee to give him all the money in the cash register.

It should be noted that *Meserve* is one of those cases in which an officer testified about statements by an eyewitness to explain why he drove past the defendant's house (the example discussed above) and in which the court of appeals found that such testimony was irrelevant (but harmless error). But, it is not that part of the opinion that matters here. What matters here is the discussion by the court of appeals as to the burdens that lawyers must bear when raising and responding to objections.

The court first examined the requirements placed on trial counsel when Meserve complained that the trial judge admitted a 20-year-old conviction to impeach a defense witness. The government responded that Meserve failed to object at trial and thus waived any complaint. The court of appeals found that the failure to object meant that the admission of the evidence could only be reviewed for plain error, and there could be no plain error because Rule 609(b) permits a trial judge to admit convictions more than 10 years old using a balancing test, and the absence of an objection deprived the trial judge of the opportunity to rule. Thus, Meserve's lawyer failed to meet his obligation to demonstrate entitlement under Rule 609(b). The failure was costly, because the end result was no appellate review. (271 F.3d at 321–22.)

Meserve also complained on appeal about the cross-examination of his brother by the prosecution. He claimed that the cross-examination was not permissible under Federal Rules of Evidence 608(b) and 609. The relevant portion of the examination is as follows:

**Prosecutor:** Now, Mr. McKee [defense counsel] asked you questions about your conviction for unlawful sexual contact in '94 and '95, but that's not your only conviction, is it?

**Witness:** I have a couple of assaults on my record.

**Prosecutor:** Nineteen-ninety-nine to 1979, disorderly conduct.

**Defense:** I object, your honor. That's improper cross-examination under Rule 609. It specifically precludes that. A disorderly conduct?

**Prosecutor:** I can lay a foundation for it.

**Court:** Go ahead.

**Prosecutor:** You're a tough guy, aren't you, Kevin?

**Defense:** I object.

**Court:** Overruled.

**Prosecutor:** You're a tough guy, aren't you?

**Witness:** I wouldn't classify myself as a tough guy.

**Prosecutor:** Been in a lot of fights in your day?

**Defense:** I object. Improper character evidence, impeachment.

**Court:** Just a minute. Objection's overruled.

**Witness:** How many would you classify as a lot?

**Prosecutor:** More than one?

**Witness:** Yeah, I've been in more than one; probably two.

**Prosecutor:** Okay. And as a result of that, people in the community are afraid of you, aren't they?

**Witness:** No.

**Defense:** Object, your honor. A continuing objection to my client's—excuse me—this witness's alleged behavior in the past as not being relevant, as not being permissible character evidence under Rule 608 or any other rule.

**Court to prosecutor:** Mr. McCarthy?

**Prosecutor:** Well, your honor, I disagree. If his reputation in the community is basically as an assaultive person about whom people are afraid, that's very significant when it comes to the other people's testimony about him and about what's happened.

**Court:** I'm going to allow it over objection. You'll have a continuing objection.

**Defense:** Thank you, your honor.

**Prosecutor:** In fact, you were convicted of assault as recently as 1997, weren't you?

**Defense:** Same objection, your honor.

**Court:** You have a continuing objection.

**Defense:** This is with respect to Rule 609.

**Court:** Overruled.

**Witness:** Yes.

**Prosecutor:** Is that right?

**Witness:** Yes.  
(*Id.* at 323.)

Meserve objected to all of this questioning. He as-

serted that the questions that asked the witness if he was a "tough guy" who had been in "a lot of fights" were improper character evidence under Rule 608 and that questions about the witness's disorderly person and assault convictions were improper under Rule 609(a). As it did in responding to Merserve's Rule 609(b) claim, the government responded that Meserve failed to preserve these issues for review.

The court of appeals went out of its way in its opinion to highlight the fact that the government devoted a great deal of space in its brief and time during its oral argument to defending the position that the issues raised by Meserve on appeal were not preserved for review because the defense failed to make both contemporaneous objections and motions to strike and because the witness did not answer many of the government's questions or provided answers arguably favorable to the defense. (*Id.* at 324.) Although the court concluded that the government's position was "untenable," it explained that it took time to deal with that position "[b]ecause of the vehemence with which the government argues a position with no seeming support in the law." (*Id.*)

Thus, the court explained the burden that a party must bear when making an evidentiary objection. The court addressed the Rule 609(a) issue first and concluded that an "[e]xamination of the transcript . . . reveals that Meserve's attorney objected as soon as it became obvious that the government's line of questioning was in violation of Rule 609, *i.e.*, when the government indicated that the conviction about which it was asking was a twenty-year-old disorderly conduct conviction." Although the court recognized that an objection must be made as soon as the ground is known and that an objection to a question should be made before the answer is given, it added that "the defense was not required to anticipate the government's line of questioning in order for the objection to be timely." Applying the general principle to the facts, the court ruled that "Meserve's objection, although delayed, was sufficiently contemporaneous to comport with the Federal Rules of Evidence." (*Id.* at 324–25.)

The court proceeded to reject the government's attempt "to place an additional onus on parties opposing the admission of such evidence . . . by arguing that the defense was further obligated to move to strike [the witness's] answers to the government's questions in order to preserve Meserve's right to review." The court responded to the government's argument that "once a question has been answered, even if that answer was provided pursuant to a district court's evidentiary ruling, the proper procedural vehicle to preserve rights for appeal is the motion to strike" with the comment that "[t]he government was able to cite no authority for this

proposition during oral argument and the court has found none." (*Id.* at 325.)

The court explained the requirements imposed upon an objecting party as follows: "Because Rule 103 is written in the disjunctive, the right to review may be preserved either by objecting or by moving to strike and offering specific grounds in support of that motion. The rule is intended to ensure that the nature of an error was called to the attention of the trial judge, so as to 'alert him to the proper course of action and enable opposing counsel to take proper corrective measures.' Fed. R. Evid. 103(a) advisory committee's note. Thus, both the plain language and underlying goals of Rule 103(a) indicate that a party opposing the admission of evidence may do so through either a timely objection or motion to strike." (*Id.*)

The court found that the government's argument was not only without legal support but was also "contrary to logic." The court found that to adopt the notion that "even if a witness's answer was given pursuant to a district court's order overruling an objection, the party opposing admission of the evidence must move to strike the witness's answer to escape plain error review" would amount to requiring "procedural redundancies." Such redundancies if adopted "would take several steps back from the streamlining that the Judicial Conference, the Supreme Court, and the Congress attempted to accomplish through the enactment of the Federal Rules of Evidence in 1975." (*Id.*)

The court also rejected the government's argument that where the witness did not answer the question posed, or where the answer elicited was arguably favorable to the defense, review was not warranted. Once more, the court concluded "[t]his position is without support in the law." (*Id.* at 326.) In essence, the government sought to relieve the party fighting an objection of responsibility for its position depending on the answers given by a witness when the objection is overruled.

Although the court was sympathetic to the idea that the nature of the witness's answers might affect a determination of whether a trial judge's erroneous admission of evidence was harmless or prejudicial, it declined to ignore the fact that "[e]ven when a question elicits no answer or an answer arguably favorable to the defense, the question itself may nevertheless prejudice a defendant because of the weight a jury gives to the questions asked by a prosecutor." (*Id.*)

Thus, the court made clear that the objecting party is responsible for a timely, specific, and correct objection

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and no more, and the offering party is responsible for the evidence it puts forth and the arguments it makes to persuade a trial judge to overrule an objection. The court proceeded to examine Federal Rule of Evidence 609(a), which reads in relevant part:

For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by . . . imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Analyzing the rule, the court concluded that “the government could only inquire about [the witness’s] convictions for disorderly conduct and assault if the crimes were punishable by a term of imprisonment greater than one year or involved dishonesty or false statement.” Looking at Maine law, the court found that

disorderly conduct is a Class E crime punishable by a maximum term of six months, and assault is a Class D crime punishable by a term of imprisonment less than one year except when the perpetrator is at least 18 years of age and the assault produced bodily injury to a child under six years of age, in which case the crime is classified as a Class C crime, punishable by a prison term of up to five years.

With this background, the court turned to the critical question: Who

bore the burden of demonstrating that the conviction either fell within or without Rule 609 (a)

—the prosecution or the defense? The court found nothing in the record to tell it whether the witness’s assault conviction was for bodily injury to a child less than six years old. The government argued that “[I]t is Meserve’s failure [to] develop a record that leaves this court with inadequate facts to resolve the issue definitively.” (*Id.* at 327.) But, the court rejected this argument as a violation of our first basic rule that the party relying on a rule must be able to demonstrate that it satisfies the rule: “[I]t is a principle too simple to seem to need stating, however, that the government, as the party

seeking to introduce evidence of a prior conviction for impeachment purposes under Rule 609, was obligated to have researched [the witness’s] prior offenses and to have determined that they were admissible.” (*Id.* at 327–28.) In other words, Meserve met his burden by pointing out that assault is usually a misdemeanor. That was all that was required. If the government claimed that this witness’s assault was something other than a traditional misdemeanor, it had to prove it. The court acknowledged that “the government may have been in possession of precisely such proof, and merely failed to produce it because the district court did not demand it upon Meserve’s objection,” but this did not excuse the government because “the failure of the district court to press the government on this issue does not shift the burden to Meserve.” (*Id.* at 328.)

The court held that the convictions did not fall within Rule 609(a)(2). Thus, they should not have been admitted on the record before the court. The court then turned to the Rule 608(b) issue. That rule provides in relevant part as follows: “The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.”

The court concluded that the witness’s status as a “tough guy” and his reputation in the community for violence had nothing to do with credibility, and questions eliciting this evidence were impermissible. Moreover, the court found that questions about specific instances of conduct did not satisfy the rule because the conduct had nothing to do with credibility. Once again, in so ruling, the court recognized that Meserve met his burden by invoking Rule 608(b) and claiming in a timely and proper manner that the government’s questions were prohibited by the rule. The government bore the burden, which it did not satisfy, of showing that the defense objection was incorrect or that it had another rule to justify its questions.

In the end, the *Meserve* court found the trial judge’s errors in permitting the questioning of the defense witness to be harmless. The analysis of evidentiary burdens is unaffected, however, by the harmless error determination.

### The third basic principle

Counsel must understand the rules. The final basic principle is closely related to the second. For counsel to be successful in making or responding to objections, counsel must understand what a rule requires or prohibits. This rule seems obvious, but it nonetheless re-

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quires mention. Had Meserve's attorney failed to raise the correct objection to the cross-examination testimony, the trial judge's overruling of the objection would have been correct. Suppose, for example, Meserve's counsel had objected to the prior convictions on grounds of relevance. Such an objection might well have been overruled, since it is arguable that any prior conviction might be relevant to credibility. After all, Rule 609's restrictions would not be necessary if all prior convictions that were excluded by Rule 609 would also be excluded under relevance rules.

Once a facially applicable objection is raised, the burden is on the proponent of evidence to respond to that objection. In order to make a winning response, the proponent must demonstrate an understanding of the rule on which the objection is based and/or any other competing rule. When, for example, Meserve's counsel objected to the questions about the witness's assaultive character and reputation, it was important for government counsel to recognize that Rule 608(a) permits a witness's reputation for untruthfulness to be admitted in order to attack a witness and a witness's prior acts to be the subject of inquiry so long as they relate to truthfulness. Rule 608 is not a general character evidence rule or a general rule about specific acts; it is a rule that focuses on ways of impeaching and rehabilitating witnesses, and its focus is on truthfulness. Thus, an argument by the government

under the circumstances of *Meserve* that evidence tends to prove reputation or that the prosecution has a good faith belief that specific acts occurred addresses the wrong matter unless the reputation and the specific acts relate to credibility. Only arguments and explanations that focus on a witness's truthfulness or untruthfulness can properly prevail when an evidence fight arises under Rule 608.

## Conclusion

These three basic principles govern all evidence battles. First, the proponent of an evidence rule must demonstrate entitlement. That is the most basic and important rule. Second, counsel must know what the burden is that he or she must bear, and what is required of an adversary. *Meserve* illustrates well how an objection is properly raised, and what is required of the proponent of evidence to respond properly. *Meserve*, as the court recognized, might well be a case in which the prosecution might have properly won the Rule 609 fight had it understood what was required of it when Meserve raised his objection. Third, counsel must understand the substance of each rule of evidence. Even if the burden is recognized and undertaken, it will not be satisfied if counsel fails to comprehend the limits of a rule of evidence. This, too, is illustrated by *Meserve*. ■

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## ETHICS (Continued from page 34)

(Ga. 1998), held that "the proffered evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the other person with the *corpus delicti*, or show that the other person has recently committed a crime of the same or similar nature."

These rigorous direct connection limitations on Plan B are at odds with the ethics rules' permissive attitude toward the use of Plan B. Substantial direct connection rules also implicitly require defense counsel to have sufficient resources to thoroughly investigate possible alternative perpetrators in order to establish the necessary connection with the crime to introduce evidence or cross-examine about their opportunities or motives for committing the offense.

Some commentators have argued that high direct connection hurdles undermine the burden of proof, disrupt the balance of the adversarial system, and may even impair a defendant's Sixth Amendment jury trial right. As Professor Wigmore stated:

[I]f the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but

should afford the accused every opportunity to create that doubt. A contrary rule is unfair to a really innocent defendant.

(1A Wigmore, *Evidence* § 139, at 1724 (TILLERS REV. 1983).)

## Conclusion

The Plan B strategy has both virtues and vices. It is precisely this tension that several episodes of *The Practice* have successfully tapped. Lawyers using the alternative perpetrator strategy advance a worthwhile goal—making the government produce sufficient evidence before convicting someone of a crime. In doing so, though, they may shield a guilty client from conviction and harm innocent third parties. These negative consequences are obvious, vivid, and concrete. The good it produces, by contrast, is abstract and all but invisible to a public that sees trials as primarily about accurately determining historical truth rather than assessing the adequacy of evidence produced at a trial. It is little wonder then that the use of Plan B sparked the anger and outrage it did in the Westerfield trial. There is little doubt that it will continue to do so. ■